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No. 92-2026

In the Supreme Court of the United States

OCTOBER TERM, 1993

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

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1. Petitioner claims (Pet. Reply 2) that, contrary to the government's assertion, see Memo. in Opp. 2-3, the petition for a writ of certiorari in this case is not out of time because the petition for rehearing to the Ninth Circuit was timely filed. Petitioner argues that, under the Federal Rules of Appellate Procedure and the Rules of the Ninth Circuit as interpreted by that court, a petition for rehearing is deemed filed as of the time it is deposited in first class mail. Petitioner notes that the petition for rehearing was mailed to the Ninth Circuit on October 8, 1992, which was within the 14-day period allowed for the filing of a petition for rehearing from the final judgment in this case.

The sources upon which petitioner relies do not support the contention that a petition for rehearing is filed when mailed. Petitioner points to Subsection (b) of Fed. R. App. P. 40, entitled "Petition for Rehearing," which states that copies of a petition for rehearing "shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs." Rule 31(b), entitled "Number of Copies to be Filed and Served," deals exclusively with the number of copies of briefs to be filed with the court and served on counsel, and is silent with respect to the time for filing a brief. That subject is addressed separately in Rule 31(a), to which Rule 40 does *not* refer. Moreover, neither Rule 40 nor Rule 31 speaks to the method by which various types of papers are deemed filed with the court. That question is separately addressed in Fed. R. App. P. 25(a), which states that "filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing [using] the most expeditious form of delivery."

The category of "briefs," which are deemed filed upon mailing under Rule 25(a), does not include petitions for rehearing. The appellate rules treat petitions and briefs as distinct by establishing separate rules that incorporate different procedures for each type of filing. Compare Rules 28, 31, 32 with Rule 40. The fact that Rule 40(b), in prescribing the number of copies of petitions for rehearing to be filed, refers to the parallel rule (Rule 31(b)) for briefs, does not demonstrate that a petition for rehearing is a brief, or that the categories overlap under the rules. Rather, the use of separate sections (Rule 31(b) and Rule

40(b)) for briefs and petitions to address the same issue—the number of copies of the document to be filed—leads to the opposite conclusion.

Petitioner also suggests (Pet. Reply 2) that the rules of the Ninth Circuit establish that a petition for rehearing is filed on the day it is mailed first class. The circuit court rules to which petitioner refers do not support that proposition. Circuit Rule 31-2, which cites both Fed. R. App. P. 25(a) and 31(a), establishes requirements for serving and filing briefs. However, nothing in the text of the Rule indicates that the category of "briefs" to which it repeatedly refers includes petitions for rehearing.[1] Like the

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[1] Petitioner claims (Pet. Reply 2) that, under the Ninth Circuit's decision in *United States* v. *Aguilar-Correa*, 953 F.2d 558, 559 (1992), "[a] petition for rehearing is a 'brief' within the meaning of [Circuit] Rule 31-2." Therefore, petitioner argues, a first class mailing operates as a filing of a petition under the terms of Circuit Rule 31-2.1(c), which provides that "[i]n all cases, first class mail shall be deemed to be the most expeditious form of delivery by mail. (See FRAP 25(a))." Petitioner's argument is based on a misreading of *Aguilar-Correa*. In that case, the Ninth Circuit deemed untimely a government motion for an extension of time to file a petition for rehearing on the authority of Circuit Rule 31-2.3(b), which states that a motion for an extension of time "shall be filed at least 7 days before the expiration of the time prescribed for filing the brief." See 953 F.2d at 559. Thus, *Aguilar-Correa* stands for the limited proposition that, for the purpose of determining when an application for an extension of time to file a petition for rehearing must be filed, the Ninth Circuit will apply the rule for briefs under Circuit Rule 31-2.3(b). The court's decision to use that rule can be explained by the fact that the question of when a motion for an extension of time to file a petition for rehearing is due is not independently addressed in the federal or Ninth Circuit rules. In contrast, the point at which a petition for rehearing is considered filed—

federal rules, the Ninth Circuit rules deal with briefs and petitions for rehearing in separate sections, compare Circuit Rules 31-1 and 31-2 with Circuit Rules 35 and 40. None of these rules expressly modifies the application to petitions for rehearing of the statement in Fed. R. App. P. 25(a) that, save for briefs and appendices, papers are deemed filed with a court of appeals upon arrival. See Circuit Advisory Committee Note to Rules 35-1 to 35-3 (under the heading "Time for Filing," stating only that a petition for rehearing must be filed "within 14 days after the filing of the original disposition" without addressing when a petition is deemed filed). Since the

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upon arrival at the court—is fixed by Fed. R. App. P. 25(a), and neither *Aguilar-Correa* nor the text of Circuit Rule 31-2 alters that rule. In any event, the order in *Aguilar-Correa* was withdrawn by the Ninth Circuit less than five months after it was issued, see 965 F.2d 772 (1992), and thus no longer has precedential force.

Even if, as petitioner argues, a petition for rehearing could be considered a "brief" for all purposes under Circuit Rule 31-2, the text of Subsection 2.1(c) of that rule would not establish, as petitioner suggests, that a petition for rehearing is filed when mailed. Referring to Fed. R. App. P. 25(a), Subsection 2.1(c) states that "in all cases, first class mail shall be the most expeditious form of delivery by mail." That statement does no more than define the type of mailing that shall be considered the "most expeditious form of delivery" within the meaning of Fed. R. App. P. 25(a). It does not alter or expand the categories of papers that may be deemed filed by that method, which, under Rule 25(a), include only "briefs and appendices." As we have explained, however, the term "briefs" as used in the federal appellate rules does not include petitions for rehearing. Thus, Ninth Circuit Rule 31-2.1(c) does not alter the federal appellate rule that petitions for rehearing are filed when delivered to the court.

Ninth Circuit rules do not effectively "enlarge" the time allocated for filing a petition for rehearing, see Fed. R. App. P. 40(a), nor modify the filing procedures, the federal appellate rules must control. Under those rules, petitioner's petition for rehearing was filed when received, not when mailed. Fed. R. App. P. 25(a). Since the petition was docketed as filed on October 13, 1992, beyond the 14 days allowed under Fed. R. App. P. 40(a), it was out of time, and so was the petition for a writ of certiorari. See Memo. in Opp. 1-2.

2. Although we believe that, under the federal and circuit court rules, the petition for rehearing in this case was not timely filed, the question nevertheless remains whether this petition was presented to the court of appeals as timely by the Clerk of the Ninth Circuit so as to raise the possibility that the court denied the petition on the merits (and not for untimeliness). See Memo. in Opp. 2; Pet. Reply 4 n.4. Because the letter lodged by petitioner with this Court creates some uncertainty on this point (see letter of August 12, 1993, from the Senior Deputy Clerk of the Ninth Circuit, Jereldine Curtis, to Christopher Foster, counsel for petitioner), we will address the issues raised in the petition in the remainder of this brief.

a. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*,[2] requires the Administrator of the Environmental Protection Agency (EPA) to publish National Ambient Air Quality Standards (NAAQS) for air pollutants. 42 U.S.C. 7409(a). On February 8, 1979, the EPA approved a NAAQS for ozone, 44 Fed. Reg. 8202 (1979), a substance that results from the interac-

[2] All references to the Clean Air Act will be to the Act as it currently stands unless otherwise indicated.

tion between substances such as volatile organic compounds (VOCs) and sunlight. One of the principal sources of VOC emissions is paint solvent evaporation. See generally *id.* at 8202-8204. As part of its scheme to establish "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution," *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990), the CAA provides for each State to submit to the EPA a plan to implement and maintain the National Ambient Air Quality Standards. 42 U.S.C. 7410(a)(1). The EPA is required to approve the state implementation plan (SIP) if it comports with the Act. 42 U.S.C. 7410(a)(2) and (k)(1)(B). See generally *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63-67 (1975). The Act also authorizes a State to propose SIP revisions and requires the Administrator to approve them if certain requirements are met. 42 U.S.C. 7410(a)(1), (a)(2), and (k)(1)(B). See *General Motors Corp.* v. *United States*, 496 U.S. at 533.[3] Once a SIP or SIP revision is approved by the EPA, it is enforceable by the EPA as federal law. 42 U.S.C. 7413(a)(1).

b. Section 307(b)(1) of the Act provides for judicial review of, among other actions, the Administrator's promulgation of any NAAQS or approval of a SIP or SIP revision. 42 U.S.C. 7607(b)(1). The Act provides that petitions to review such actions must be filed in the court of appeals within 60 days after the date on which notice of the promulgation or approval appears

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[3] Under the Act, States retain authority to adopt air pollution control standards or limitations that are more stringent than those established by federal law. 42 U.S.C. 7416.

in the *Federal Register*. 42 U.S.C. 7607(b)(1). The Act specifically provides that:

> Actions of the Administrator with respect to which review could have been obtained under paragraph (1) [by way of petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. 7607(b)(2).

c. Under California law, local and regional authorities have primary responsibility for establishing state law controls on air pollution. In 1984, two of these local authorities, the South Coast Air Quality Management District (South Coast District) and the San Diego County Air Pollution Control District (San Diego District), adopted rules regulating the VOC content of non-flat architectural coatings offered for sale or sold in containers larger than one liter. These rules were submitted to the EPA, which approved them as a part of the California SIP on January 24, 1985. 50 Fed. Reg. 3338 (1985).

Subsequently, the South Coast District and the San Diego District adopted more lenient rules governing the VOC content of non-flat architectural coatings and submitted them to the EPA for approval. See 54 Fed. Reg. 5236 (1989). However, since these rules were more lenient than the VOC content rules approved in 1985, they were unenforceable by the State unless approved by the EPA. 42 U.S.C. 7416. The EPA rejected the more lenient South Coast District VOC limitation on February 2, 1989. See 54 Fed. Reg. 5236 (1989). The San Diego revision expired by its own terms on September 1, 1986. See Gov't C.A. Br. App. 2.

d. The CAA authorizes the EPA to impose civil penalties on private companies for violations of the Act's air quality standards and also authorizes penalties for failure to comply with requests for information concerning possible violations. See Sections 110, 113, and 114 of the CAA, 42 U.S.C. 7410, 7413, and 7414.[4] In 1987, the EPA decided to take enforcement action against companies not in compliance with the VOC limitations in the South Coast and San Diego Districts. To determine the company's compliance status, the EPA issued requests for information in March 1987 and May 1987 to petitioner Vista Paint Corporation, Pet. App. 23a-24a, a long-time manufacturer of VOC-containing coatings. Petitioner responded to the first, March 19 request only after the EPA issued an administrative order requiring it to do so. In that letter, the company admitted that it was selling paint that did not comply with the VOC limitations. After the EPA determined that petitioner's response to the information requests was inadequate, the EPA issued a Notice of Violation to the company under Section 113(a)(1) of the Act, 42 U.S.C. 7413(a)(1). Pet. App. 24a. The EPA then sent an additional request for information on June 19, 1987. In a letter sent a month later, the EPA informed petitioner that certain information in its June request did not have to be submitted if petitioner: (1)

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[4] In November 1990, one month before the EPA filed a civil action in this case, the Act was amended to add a new Section 113(e), 42 U.S.C. 7413(e), which expands the number of factors the court must consider in assessing civil penalties for noncompliance with the Act. Cf. Pet. App. 33a-34a (old Section 113(b), 42 U.S.C. 7413(b)(1988)) with Pet. 3 (text of new Section 113(e)).

ceased manufacture of non-complying paint by July 1, 1987; (2) agreed to cease all sales of non-complying coatings by September 1, 1987; and (3) disclosed the time and location of sales of non-complying paint in August 1987. *Id.* at 25a. Petitioner did not provide the requested reports to the EPA, but continued to sell and offer for sale non-complying paint until at least October of 1987. *Id.* at 25a-28a.

e. On December 3, 1990, the United States brought this enforcement action under Sections 110, 113, and 114 of the CAA, 42 U.S.C. 7410, 7413, and 7414, for civil penalties of $25,000 for each day that petitioner failed to comply with the EPA's information requests and sold or offered paint for sale in violation of the VOC limits. C.A. E.R. (ER) 5. Petitioner then filed a third-party complaint against the EPA, the South Coast District, the San Diego District, the Air Resources Board, and the Technical Review Board (ER 36-56) and a counterclaim against the United States (ER 31-34), claiming that the VOC SIP limitations were invalid under state law. Both the third-party complaint and the counterclaim were dismissed for lack of subject matter jurisdiction and for failure to state a claim. ER 58-61.

f. Following full briefing and a hearing, the district court granted the government's motion for summary judgment. Pet. App. 20a-37a. The district court considered the factors bearing on the amount of the penalty under the previous version of Section 113, including "the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. 7413(b) (1988); Pet. App. 33a-35a. The court then imposed a civil penalty of $1,000 per day for each of the 468 days that

petitioner sold paint in violation of the VOC standards prior to petitioner's receipt of the notice of violation on June 24, 1987, and a $12,500 per day penalty for each of the 110 days that petitioner was in violation of the Act's sale and reporting requirements, from June 24, 1987, to October 12, 1987, for a total penalty of $1,843,000. Pet. App. 35a. The district court also assessed a civil penalty of $1,000 per day for each of the 1177 days that petitioner was in violation of the EPA's subsequent, June information request, for a total of $1,177,000. *Id.* at 36a.

g. Relying on Fed. R. Civ. P. 52(b), 59(a), and 60(b), petitioner then filed a pleading styled "Motion for Findings of Fact and for Relief From and Amendment of the Judgment" in which it requested, *inter alia*, that the district court reexamine the penalties in light of the factors contained in the new Section 113(e) of the Act, which had been added to the Act effective November 1990. On February 11, 1992, the district court issued amended findings of facts and conclusions of law in which it affirmed its grant of summary judgment in favor of the government. Pet. App. 40a-58a. The court refused to reduce the amount of the penalties based on consideration of the Section 113(e) factors. Specifically with respect to the factor of "the economic benefit of noncompliance," the court found, based on facts in the record, that petitioner "obtained a significant economic benefit from its illegal * * * sales of non-compliant coatings." Pet. App. 56a. The court also held that petitioner had "failed to submit admissible evidence to controvert the United States' showing of [petitioner's] significant economic benefit." *Ibid.*

h. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-12a. In relevant part, the court affirmed the dismissal for lack of jurisdiction of the third-party complaint and counterclaim challenging the validity of the VOC limitations. Pet. App. 3a. The court of appeals noted that petitioner had "ample opportunity" to submit comments to the State on the local rules and to challenge the EPA's approval of the SIP provisions under Section 307(b) of the CAA. Pet. App. 3a. The court of appeals also affirmed the district court's finding of petitioner's liability for selling and offering for sale non-compliant paint and the failure to provide requested information. *Id.* at 3a-5a. However, as to the penalty, the court of appeals found that disputed factual issues precluded summary judgment as to some of the factors that a court is required to consider under new Section 113(e)(1), including the economic impact of the penalty, the company's good faith efforts to comply, the seriousness of the violation, and the reasonableness of EPA's inaction on the proposed SIP revisions that were ultimately rejected or expired. Pet. App. 5a-10a. With respect to the remaining Section 113(e) factors, the court of appeals upheld the district court's determination that no reduction of the penalty was warranted based on the facts as found in the record. Pet. App. 6a-11a.

3. The court of appeals correctly upheld the district court's dismissal for lack of jurisdiction of petitioner's claims that the VOC regulations were invalid because inconsistent with state law. The courts of appeals uniformly hold that a party may not assert the invalidity of CAA regulations in an enforcement proceeding based on grounds that could

be considered by the Administrator in deciding whether to approve the regulations or by the court of appeals in reviewing the Administrator's action under Section 307(b)(1). See, *e.g.*, *United States* v. *Ethyl Corp.*, 761 F.2d 1153, 1155-1158 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986); *Action for Rational Transit* v. *West Side Highway Project*, 699 F.2d 614, 616 (2d Cir. 1983) (per curiam); *Lubrizol Corp.* v. *EPA*, 562 F.2d 807, 813-815 (D.C. Cir. 1977). Under this rule, petitioner's third-party claims and defenses based on state law were properly dismissed, because the issue that petitioner sought to raise—whether the VOC regulations comply with state law—is one that the Administrator is authorized to consider in deciding whether to approve the VOC regulations. The Administrator's authority in this area is established by the CAA provision requiring that States submitting implementation plans to the EPA provide necessary assurances that they will have adequate authority under state law to carry out the plan. 42 U.S.C. 7410(a)(2)(E). Had petitioner sought review of the Administrator's approval of the VOC SIP provisions under Section 307(b)(1), the court could have considered petitioner's claim that the VOC SIP provisions were contrary to state law. That claim is therefore barred in this enforcement action.

There is no merit to petitioner's contention (Pet. 18-19) that the court of appeals' jurisdictional ruling conflicts with decisions of other courts of appeals, because the decisions on which petitioner relies all accept the general proposition that Section 307(b)(2) bars review of issues that a court of appeals could consider in reviewing the Administrator's decision to approve a SIP. Thus, in *Lloyd A. Fry Roofing Co.* v.

EPA, 554 F.2d 885, 892 (8th Cir. 1977), the court held that the plaintiff could not attack the constitutional validity of an approved SIP in an enforcement action because he could have raised that objection in a Section 307(b)(1) proceeding to review the Administrator's approval of the plan. The court explained that the court of appeals could consider the constitutional validity of the decision in the course of its determination whether the Administrator's decision was "in accordance with the law" under the Administrative Procedure Act, 5 U.S.C. 706. In *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 173 (6th Cir. 1973), and *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839, 845 (7th Cir. 1975), the courts ruled that a party could raise claims of economic or technological infeasibility in an enforcement action because those factors are not properly considered by the Administrator in evaluating a SIP, or by a court of appeals as a basis for setting aside an approved plan on review under Section 307(b)(1). See *Union Electric Co.* v. *EPA*, 515 F.2d 206 (8th Cir. 1975), aff'd, 427 U.S. 246, 265-267 (1976); see also *Union Electric Co.* v. *EPA*, 593 F.2d 299, 300 (8th Cir.), cert. denied, 444 U.S. 839 (1979).[5] In

[5] In *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 355-356 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973), the court refused to allow the defendant oil company to raise "the questions of economic hardship or lack of compelling necessity" as a defense in an enforcement action, holding that it could have raised those issues "in a section 307 hearing." 467 F.2d. at 357. To the extent there is any inconsistency between *Getty Oil* and the decisions in *Buckeye Power* and *Indiana & Michigan Electric*, it is over the issue of whether economic hardship can be raised in a Section 307 action. There is no disagreement over the basic principle that a party is barred from raising in an enforcement action any questions that a court of appeals could

contrast with *Buckeye Power* and *Indiana & Michigan Electric*, the claim in this case is not one of technological or economic infeasibility, but rather of the invalidity of the VOC regulations under state law —an issue that the Administrator can consider and the court of appeals can review in a Section 307 proceeding. Thus, the court of appeals correctly affirmed the district court's dismissal of petitioner's claims and defenses of invalidity.[6]

4. Petitioner maintains (Pet. 17, 23) that it was denied "any real opportunity to litigate the new Section 113(e) issues" because the courts below "refused to consider" evidence offered by petitioner concerning the Section 113(e) factors. Although the court of appeals agreed with the district court's statement that some of the evidence offered by petitioner in the post-judgment proceedings was inadmissible, see, *e.g.*, Pet. App. 8a-9a,[7] the district court did not grant the government any opportunity to present evidence or arguments in the post-judgment proceedings that was not also available to

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consider in reviewing the Administrator's decision in a Section 307 proceeding.

[6] The court of appeals' decision is not in conflict with *New Mexico Environmental Improvement Div.* v. *Thomas*, 789 F.2d 825, 833 (10th Cir. 1986), or *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1151 (7th Cir. 1983). See Pet. 19. These cases hold that a successful challenge to a SIP in state court renders the plan unenforceable in state and federal court. Here, by contrast, these VOC SIP provisions have never been challenged in state court and, consequently, have never been declared invalid.

[7] Petitioner does not challenge the evidentiary rulings directly, nor does it offer any explanation as to why those rulings might be incorrect. See Pet. 12-18.

petitioner. Thus, petitioner's complaint is, at bottom, an objection to the district court's findings of fact and to its analysis of the Section 113(e) factors in light of the evidence properly in the record. See Pet. App. 54a-57a. These fact-bound evidentiary claims do not warrant this Court's review. In any event, to the extent that petitioner objects to the district court's analysis in its ruling on the post-judgment motion, its arguments are not properly before this Court because petitioner failed to present the arguments to the court of appeals, and the court of appeals declined to consider them. See Pet. App. 11a (Petitioner "never expressly argued in its opening brief that the district court erred in denying its post-judgment motion. Even in its reply brief, [petitioner's] arguments were, at best, unclear.")

There is also no merit to petitioner's contention (Pet. 20-23) that the court of appeals' decision conflicts with *Saunders* v. *Shaw*, 244 U.S. 317 (1917), and *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). In *Saunders* v. *Shaw*, 244 U.S. at 319, this Court held that an intervening bondholder was deprived of his right to due process of law when he was precluded by various court rulings from ever offering evidence at trial. In this case, in contrast, the district court held a hearing on the government's motion for summary judgment and a hearing on petitioner's post-judgment motion, and petitioner had ample opportunity to present evidence at both of these proceedings. In *Armstrong* v. *Manzo*, 380 U.S. at 552, the Court reversed the lower court judgment on the ground that a father failed to receive notice of a child support hearing and that a second hearing with notice failed to cure the original defect. The Court held that "an opportunity

[to be heard] must be granted at a meaningful time and in a meaningful manner." Petitioner in this case had two meaningful opportunities to be heard before the district court. No further review of these claims is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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